Supreme Court of the United States

LUCILLE HARVEY, AN UNMARRIED WOMAN,
PETITIONER,

VS.

CITY OF ST. PETERSBURG, A MUNICIPAL CORPORATION, FOR THE USE OF GLENN V. LELAND, AS RECEIVER OF THE CERTIFICATE SINKING FUND OF THE CITY OF ST. PETERSBURG, FLORIDA,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the Supreme Court of Florida to be reviewed in this case was rendered June 28, 1940, and is reported in 197 So., at page 116.

This opinion refers to and adopts as the law of this case a former opinion of the Florida Supreme Court rendered in this case, reported in 189 So. 861.

The judgment and decree of the circuit court is not reported.

GROUNDS OF JURISDICTION INVOKED.

The jurisdiction of this court is invoked under the provisions of Section 237 (b) of the Judicial Code as

amended by the Act of February 13, 1925, Section 344 (b) of Title 28 of United States Code Annotated.

STATEMENT OF THE CASE.

A concise statement of the case is set out in the petition for writ of certiorari (pp. 3-6), which statement is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS.

A specification of the errors assigned is set out in the petition for certiorari (pp. 6-7) to which this brief is attached, which specification is hereby adopted and made a part hereof.

ARGUMENT.

Glenn V. Leland, a state court receiver, was appointed for the express purpose of foreclosing municipal public improvement liens against petitioner's real estate and other property, and he has secured a final decree of foreclosure and an order to sell petitioner's lands.

Does this procedure deny to petitioner the rights, privileges and immunities, and the protection of her property, guaranteed to her under the provisions of the Fifth and Fourteenth Amendments to the United States Constitution, which provide that she shall not be deprived of her property without due process of law.

This question is presented in specification of errors numbers one, two and three (pp. 6-7 of Petition for Certiorari).

Improvement Lien and Tax, Same Type of Obligation.

An assessment by municipality for the costs of public improvement is a tax.

> *Independent School Dist.* v. *Exchange National Company*, 95 A. L. R. 686.
>
> *Philadelphia Mortgage & Trust Company* v. *City of Omaha*, 57 L. R. A. 150.
>
> *City of Roswell* v. *Bateman*, 20 N. M. 77, 146 Pac. 950, L. R. A. 1917D, 365.
>
> *Gray* v. *City of Santa Fe*, (C. C. A. 10th) 89 F. 2d 406.

"A toll is a demand quite different from a special assessment imposed for benefits. The latter is in the nature of a tax and is often called a tax."

> *Day* v. *City of St. Augustine*, 139 So. 885, 104 Fla. 399.

Equity Is Without Power to Appoint a Receiver to Levy and Collect Taxes.

In the case of *State ex rel. Lynch* v. *District Court*, 63 Pac. 2d 333, 113 A. L. R. 746, the court held:

> "The authorities hold without a dissenting voice that equity is without power to appoint a receiver to levy and collect taxes. 1 Jones on Bonds and Bond Securities (4th Ed.), Section 489; 1 Quindry on Bonds and Bondholders, Section 423; *Rees* v. *City of Watertown*, 19 Wall 107, 22 L. Ed. 72; *Meriwether* v. *Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197; *Thompson* v. *Allen County*, 117 U. S. 550, 29 L. Ed. 472."

Receiver to Collect Taxes Is As Improper As One to Levy Same.

In the case of *Meriwether* v. *Garrett*, 102 U. S. 472, 515, 26 L. Ed. 197, the rule is announced:

> "In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare and to provide the revenues for the support and due administration of the government throughout the state and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

Respondent recognizes these principles of law but says that the legislature in this case has provided otherwise.

Petitioner presents now, as she did in the lower court, the same section of the charter of the City of St. Petersburg, which respondents rely upon in support of their contention.

Section 108 of the Charter of the City of St. Petersburg, Chapter 6772, Acts of Legislature, 1913, is as follows:

> "In all the cases mentioned in this act where the City of St. Petersburg has acquired, or may hereafter acquire, liens for improvements, such liens, or any of them may be enforced in the following manner by the said City or in the name of said City by the holders; first, by a bill in equity; second, by a suit at law."

Apparently the receiver and the Florida Supreme Court took the position that the receiver is the "holder" of these certificates, and the contention is that the legislature, by this Section 108 of the City Charter, has authorized the procedure taken.

Petitioner urges that this legislative act means that these municipal improvement liens must be collected by the City, if the City owns them; if owned by third parties, they may be collected in the name of the City.

It is not denied that the City owns these public improvement liens.

Facts Briefly Stated.

These are the facts: The City of St. Petersburg issued its public improvement lien certificates. They were brought by private individuals. The City failed to pay them when they matured. The City then issued its general obligation refunding bonds and gave these bonds to the certificate holders and took up the certificates, and thus it became again the owner and holder of these certificates. They were deposited with Glenn V. Leland, the director of finance of the City. This director of finance was charged with the duty of collecting these certificates, and the proceeds were to be used in paying certain delinquent interest certificates which the City had issued and delivered to the former individual owners

of the improvement certificates, to whom it had delivered its general obligation bonds in lieu of said certificates, and to retire these bonds (p. 4 of Petition for Certiorari).

Certain owners of these delinquent interest certificates brought a bill in equity in the state court, seeking the appointment of a receiver to take charge of these improvement lien certificates held by the director of finance for the City. On this bill, a receiver was appointed. He was the same director of finance who already held the certificates for the City, and the order, appointing him, provided that he, as the court's receiver, should take from himself, as trustee, these same certificates and proceed to collect them by actions at law or in equity. This director of finance, then, as receiver, proceeded to foreclose these municipal lien certificates against petitioner's property.

The receiver and the Supreme Court of the State of Florida say that this history shows that the legislative intent, as set out in Section 108 of the charter of the City of St. Petersburg has been complied with, and by reason of that section of the charter, a state court receiver has authority to foreclose these municipal liens, presumably because he holds them.

Petitioner urges the fact that the City of St. Petersburg is the owner of these improvement certificates and that it properly held them by its director of finance, and it and its director of finance were charged with the duty of collecting these certificates; and that there was neither need nor power in the state court to appoint this director of finance as receiver, charged with no other duty except identically the same duties already resting upon him as director of finance of the City to collect these certificates and use the proceeds to pay the delinquent interest certificates and the refunding bonds which had been given for the certificates.

Petitioner says that the City of St. Petersburg is the owner, and although these certificates are now in the physical possession of this state court receiver, that the City, as a matter of fact and law, is still the holder of these certificates.

Petitioner urges that the legislative authority as set out in the city charter, Section 108 thereof, when considered in connection with the facts, does not constitute or come within an exception to the uniformly recognized principle of law hereinabove set out, and that this proceeding by this state court receiver for the purpose of foreclosing municipal improvement liens against petitioner's land is not justified or authorized by the Section 108, of the city charter, is in violation of the due process provisions of the Federal Constitution, and contrary to the organic law of the land.

Due Process of Law.

In *Pennoyer* v. *Neff*, 95 N. S. 734, 24 L. Ed. 572, the court in defining the words "due process of law" says:

> "They then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

See:

Kennard v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478.
Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. Ed. 569.
Ex parte Wall, 107 U. S. 265, 27 L. Ed. 552, 12 Am. Jur. 262 *et seq.*

Trusts.

The receiver and the Florida Supreme Court are furthermore seeking to justify their position on the theory that the circuit court was dealing with a trust fund, that

equity has jurisdiction over trusts, and, therefore, has jurisdiction to appoint the receiver for the express purpose of performing the governmental function of collecting taxes (assessments).

Petitioner urges that this theory is a fallacy and without law to support it.

It is insisted that the general equity power which a chancery court has to appoint a receiver and the general proposition that a chancery court has jurisdiction over trusts do not give power or jurisdiction to that court to appoint a receiver for the express purpose of doing a thing which the organic law says that a receiver cannot do, and such appointment is void.

> "Every judgment must contain three jurisdictional elements; namely, jurisdiction of the subject matter; jurisdiction of the person; and the power or authority to render the judgment."
>
> Freeman on Judgments, Vol. I, Sec. 226, p. 444.

In 65 C. J. 332, the rule is announced thus:

> "The right to create an express trust is subordinate to the fundamental principles of equity, and an express trust created in violation of such principles is a nullity. An express trust cannot be created to effect a purpose which is illegal."

In 26 R. C. L. 1206, a similar rule is announced:

> "If the creation of the estate depends on the execution of a void trust, then it can never come into existence."
>
> *In re Fair*, 132 Cal. 523, 60 Pac. 442; 64 Pac. 1000, 84 A. S. R. 70.

In the case of *Byrne Realty Co.* v. *South Florida Farms Co.*, 89 So. 326, 81 Fla. 805, the Florida court says:

"A lawful subject matter and competent parties having appropriate authority in the premises are requisite to the creation of an express trust."

In the case of *Childs* v. *Boots*, 152 So. 214, the court says:

"But a court may have jurisdiction of the parties and of the subject matter of a cause, and still be without jurisdiction to enter in such cause a particular kind of decree which would be wholly unauthorized. This rule is conceded on the authority of *Grace* v. *Hendricks*, 140 So. 790."

In the case of *Dewhurst* v. *Wright*, 10 So. 685, 29 Fla. 223, the Florida Supreme Court says:

"The trouble with complainants' case is that they are asking a court of equity to aid them in something which is contrary to the policy of the law. This a court of equity will not do, but, judging those who pray at its hands relief which the courts of law cannot afford by the case they make for themselves, it will leave them where they are if it appears they are seeking to evade the policy of the law as defined in a public statute (citations)."

In the case of *Rees* v. *City of Watertown*, 86 U. S. 107, 22 L. Ed. 72, this court says:

"A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels."

See, also, *Meriwether* v. *Garrett, supra.*

Remedy at Law Complete.

Petitioner urges that when Glenn V. Leland, the director of finance of the City of St. Petersburg, received

these municipal public improvement liens for the purpose of collecting them, it became his duty as an officer of the municipality to obey these instructions. If he failed or refused to perform this duty, the remedy at law was full and complete and no trust theory and no equity jurisdiction was needed.

In *Thompson* v. *Allen County,* 115 U. S. 550, 29 L. Ed. 472, on page 473, the rule is announced:

> "The remedy was by mandamus at law, and 'We have been furnished with no authority for the substitution of a bill in equity and injunction for the writ of mandamus, * * *' a court of equity is invoked as auxiliary to a court of law in the enforcement of its judgment only where the latter is inadequate to afford the proper remedy.
>
> By inadequacy of the remedy at law is here meant, not that it fails to produce the money (that is a very usual result in the use of all remedies), but that in its nature or character it is not fitted or adapted to the end in view."

See, also:

Rees v. *City of Watertown,* 19 Wall. 107, 22 L. Ed. 72.

Paducah v. *White,* 244 Ky. 733, 51 S. W. 2d 935.

Meriwether v. *Garrett,* 102 U. S. 472, 26 L. Ed. 197.

Petitioner urges that the Supreme Court of Florida committed error when it held and ruled that this receiver has powers and rights and authorities which have never been accorded to any other receiver, and that said ruling is in violation of the constitution and in direct opposition to the uniformly recognized principles of court procedure and organic law.

Appointment of the Receiver Void.

Petitioner urges that although chancery courts have the power to appoint receivers, this power is not broad enough to authorize even a chancery court to do an illegal thing which is contrary to the organic law of the land. When this chancery court attempted to appoint this receiver for the express purpose of performing this governmental function, it exceeded its power and the purported order of appointment for this purpose was void.

> "A judgment that is absolutely null and void—a mere *brutum fulmen*—can be set aside and stricken from the record, on motion, at any time, and may be collaterally assailed; * * *"
>
> *Einstein* v. *Davidson*, 17 So. 563, 35 Fla. 342.

> "If the defect of jurisdiction springs from want of power, the result is void; * * *"
>
> *Malone* v. *Meres*, 109 So. 685, 91 Fla. 709.

See, also:

Rees v. *City of Watertown*, 19 Wall. 107, 22 L. Ed. 72.

Thompson v. *Allen County*, 115 U. S. 550, 29 L. Ed. 472.

Wherefore, petitioner respectfully prays that her prayer for a writ of certiorari be granted.

Respectfully submitted,

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